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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIK CASILLAS,

Defendant and Appellant.

E044940

(Super.Ct.No. FVA022525)

OPINION

APPEAL from the Superior Court of San Bernardino County. Dwight W. Moore, Judge. Reversed.

Kathryn Roth-Douquet, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Michael Murphy, and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Erik Casillas was convicted of fraudulent use of an access card and placed on probation. On January 9, 2008, the court ordered defendant to pay \$3,491.60 in victim restitution. Defendant appeals the restitution order, arguing that it was beyond the court's jurisdiction, and that, even if the court had the power to make a restitution order, it set the amount incorrectly. We agree with defendant on the first point, and we reverse. Our determination on the first issue means that we need not reach the second.

FACTS AND PROCEDURAL HISTORY

The victims, Jaime and Catherine M., owned a business called "Floor Masters." The victims went to Mexico for several months between July and November 2003. While they were gone, they left the business in the charge of their daughter and defendant, their son-in-law. When the victims returned, they found out that defendant, by posing as Jaime M., had obtained an unauthorized ATM card for the business account. Defendant made several transactions using the ATM card.

Defendant was arrested and charged with a violation of Penal Code section 530.5, subdivision (a), identity theft, or unlawfully obtaining and using someone's personal identifying information for gain. The People and defendant reached a plea bargain agreement; the information was amended to allege as a second count, a violation of Penal Code section 484g, fraudulent use of an access card. Defendant agreed to plead nolo contendere to the new charge, and the identity theft charge was dismissed. On October 1, 2004, defendant was admitted to probation for 36 months, ordered to serve 90 days in the

county jail as a condition of probation, and ordered to pay various fines and fees, payable at the rate of \$40 per month, starting 30 days after defendant's release from custody. The matter was referred to the probation department to prepare a restitution statement. The conditions of defendant's probation required him to: "[m]ake restitution to the victim(s), through Central Collections, in an amount to be recommended by the Probation Officer and determined by the Court."

On October 20, 2004, the probation department presented its restitution memorandum. The probation department recommended ordering restitution of \$9,592.92, based on cash flow statements provided by Catherine M. A handwritten notation on one of the cash flow statements indicates,

"Total from Floor Masters	8,492.92
"Total from Personal	<u>1[,]<u>1100.00</u></u>
(money He took from me) Total	9[,] <u>592.92</u> "

There is nothing, however, tying the sum to specific portions of the cash flow statements. The probation department's memorandum noted that the restitution hearing had been continued to November 1, 2004. That hearing was continued again, to November 3, 2004, and November 18, 2004. At the hearing on November 18, 2004, defendant declined to stipulate to the amount recommended by probation, and requested a formal hearing. Defendant appeared again on December 16, 2004, and the minutes again reflect his request for a formal hearing.

In January 2005, at the continued hearing time, the People requested a continuance to obtain proper records from the victims' bank. The matter was continued to February 23, 2005. At the February appearance date, the minutes reflect that the People agreed to copy the subpoenaed records for the defense, and to return the records to the court. The bank records themselves, however, are not included in the record on appeal.

In June 2005, the minutes again reflect similar proceedings: the subpoenaed documents were given to the deputy district attorney, who promised to make copies and supply them to defense counsel. As before, no copies of the subpoenaed documents are included in the record on appeal. At the continued proceedings in July 2005, the matter was continued again for the reason that the defense had only recently received discovery. The August hearing was continued again, as defendant appeared late. The minutes of October 6, 2005 indicate that the restitution hearing was held then, but the matter was ordered off calendar.

No further minutes appear until August 2006. Defendant did not appear, and the case was ordered off calendar. March 2007 marks the next item in the record, concerning a motion to obtain subpoenaed documents. The case was reassigned several times in August 2007. The new judge continued the restitution hearing to September 13, 2007, and again to September 20, 2007. No action was taken on the September 20 date, and the court took the matter off calendar.

The next appearance was evidently on October 2, 2007; the reporter's transcript of those proceedings is not included in the record on appeal. Nevertheless, it appears that

the court announced at that time that defendant's probation had expired on the preceding day, October 1, 2007. The People argued that the court nevertheless retained jurisdiction to make a restitution order, even if the order to pay restitution could not be enforced. The defense naturally disagreed, and argued that, as defendant had pleaded no contest to only one count, or one instance, of fraudulent use of an access card, he could not be ordered to pay restitution for multiple acts of withdrawal. The court requested further briefing on the issues of its jurisdiction to order restitution, and the proper amount.

The parties filed the requested briefs. The People argued that the victims' right to restitution is constitutionally and statutorily guaranteed, and that a judgment which fails to order restitution results in an invalid sentence. From case law holding that the court retains jurisdiction to modify restitution orders even after sentencing, the People argued by analogy that the court could retain jurisdiction to set the amount of a restitution order even after probation had expired.

The defense pointed out that the prosecution had already conceded that the court could not make an enforceable order requiring defendant actually to pay any ordered amount of restitution. Defendant's probationary period had already expired. The only purpose in having the court proceed to make an order for restitution was to provide a basis for the victims to file a civil lawsuit. The defense argued, in addition, that the amount of restitution requested was excessive. Defendant had pleaded no contest only to a single count of access card use, not to a "continuing" crime. The accumulation of all the ATM charges into one restitution fine exceeded the amount that was attributable to

the offense to which defendant had pleaded no contest. Defendant had not executed a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754), permitting the trial court to consider dismissed counts that are not transactionally related to the plea offense.

On November 1, 2007, victim Catherine M. appeared at the continued hearing. The court ordered her testimony taken and preserved on the issue of the amount of restitution. She gave evidence detailing the amounts of withdrawals taken from the business account between August and November of 2003, as well as incurred overdraft and other bank charges. She also gave evidence of the costs of her transportation to the various restitution hearings, and loss of earnings on those days.

The court heard the matter on the issue of its jurisdiction to order restitution on January 9, 2008. The court stated its belief that it had jurisdiction to make a restitution order, even though “my ability to enforce that order is severely constrained. But I think if I make the order, that at least creates the possibility of it being converted to a civil judgment, and I believe I do have the jurisdiction to do that.” In face of the argument that Penal Code section 1203.3 permitted the court to modify restitution, but only during the period of probation, the court took the view that “the [L]egislature places a premium on a victim’s right to restitution. . . . [L]ooking at the overarching concern for victim restitution that I perceive as being a part of the legislative intent, . . . I think the safer course is for me to conclude that I can set restitution. If an appellate court tells me I’m misreading the statutes, well, I’d rather set restitution and have the court knock it out than

deny the victim the right to restitution, to discover at some later point that I could have done so.”

The People had requested a restitution amount of \$3,491.61, assertedly based on the victim’s testimony which had been recorded at an earlier hearing. Defense counsel argued that defendant had “only pled to one act without a Harvey waiver. It was for August 1st, which we had no testimony of. [¶] If the court’s going to say, ‘Well, on or about means maybe the beginning of August,’ we had about, probably, 80 to a hundred dollars, looks like, in overdraft charges that were charged beginning of August. But doesn’t look like there’s any evidence of any actual fraudulent use of an access card at that time. [¶] So I would submit that there’s no restitution based on her testimony.”

The court ruled that defendant did plead to fraudulent use of an access card, but defendant’s plea was not limited to August 1st. There had been testimony to repeated instances of fraudulent use of the card over a few months. The court did inquire, “are the parties in agreement that the sum that she testified to totals \$3,491.60?” Defense counsel responded that she had not actually added the sum, but “I trust [the prosecutor’s] math. She’s testified to everything he’s checked off here.”

The court accordingly entered an order fixing restitution in the amount of \$3,491.60.

Defendant filed a timely notice of appeal from the restitution order.

ANALYSIS

I. Standard of Review

“[W]hen the propriety of a restitution order turns on the interpretation of a statute, a question of law is raised, which we review de novo.” (*In re Tommy A.* (2005) 131 Cal.App.4th 1580, 1586.) Here, we must construe constitutional or legislative provisions to determine the scope of the trial court’s jurisdiction to act in imposing a restitution order.

II. The Trial Court Lacked Jurisdiction to Order Restitution After Defendant’s Probation Had Expired

Penal Code section 1203.3 provides in relevant part: “The court may modify the time and manner of the term of probation for purposes of measuring the timely payment of restitution obligations or the good conduct and reform of the defendant while on probation. The court shall not modify the dollar amount of the restitution obligations due to the good conduct and reform of the defendant, absent compelling and extraordinary reasons, nor shall the court limit the ability of payees to enforce the obligations in the manner of judgments in civil actions. [¶] . . . Nothing in this section shall be construed to prohibit the court from *modifying the dollar amount of a restitution order* pursuant to subdivision (f) of Section 1202.4 *at any time during the term of the probation.*” (Pen. Code, § 1203.3, subd. (b)(1)(A)(4) & (5), italics added.)

Here, although defendant was ordered at the outset of his probation to pay restitution, no amount was ever set during the term of his probation. The court informed

the parties at the hearing on October 2, 2007, that defendant's probation had expired the previous day, and nothing appears in the record to dispute that event.

We agree with defense counsel below, that all the parties recognized and effectively conceded "that at this point the court has no authority to order [defendant] to do anything. [The People's] suggestion that the court has the authority to 'set' the amount of restitution but no authority to 'order' the defendant to pay it has no basis in law or logic. Although a restitution *order* from a criminal court can be enforceable as a civil judgment [(Pen. Code, §§ 1202.4, subds. (a)(3)(B) and (i))], the prosecution concedes that this court has no authority to make such an order. The prosecution hopes that the court will set the *amount* of restitution which can then be collected civilly, conveniently skipping over the part of the law that requires an *order* to be made while the court has the authority to do so. This . . . procedure . . . implies that after losing jurisdiction over a defendant, a criminal court can then create what is in effect a civil judgment." We agree with this assessment; indeed, the trial court recognized that it had no authority over defendant, but set a restitution amount for the sole purpose of providing a civil remedy to the victims.

The People argue that the court did have jurisdiction to make the order here. The cases upon which the People rely are distinguishable. In *People v. Bufford* (2007) 146 Cal.App.4th 966 (*Bufford*), the court construed Penal Code section 1202.46 to permit the court to set the amount of restitution, even after the defendant had served her sentence and been discharged from custody.

Penal Code section 1202.46 provides: “Notwithstanding Section 1170, when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution *until such time as the losses may be determined*. Nothing in this section shall be construed as prohibiting a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine without a finding of compelling and extraordinary reasons pursuant to Section 1202.4.” (Italics added.)

Thus, in *Bufford, supra*, 146 Cal.App.4th 966, a defendant pleaded guilty to certain offenses and was sentenced to state prison. Certain other charges were dismissed by the court over the prosecutor’s objection. The prosecutor appealed, and the dismissed counts were eventually reinstated. The court declined to set the restitution amount while the applicability of the additional offenses was pending, as it would affect the restitution amount. By the time the hearing on restitution was calendared, the defendant had served her prison sentence. The trial court denied the People’s motion to set restitution. The Court of Appeal reversed, advertng to the specific language of Penal Code section 1202.46, which expressly provides for retention of jurisdiction, “until such time as the losses may be determined.”

In addition, the People had several times attempted to fix the restitution amount, but the defendant had objected until all the pending charges against her were resolved.

(*Bufford*, *supra*, 146 Cal.App.4th at p. 971.) The defendant in *Bufford* effectively invited the error by objecting to holding a restitution hearing while her appeals were pending and the outcome of the dismissed charges remained uncertain. By contrast, here, defendant did not object to holding the restitution hearing, and was not responsible for the delay in bringing the matter to a hearing.

Here, also, defendant was not sentenced to state prison. Therefore, Penal Code section 1202.46 did not apply. Defendant's case instead came within Penal Code section 1203.3, which governs probation. Penal Code section 1202.4, a general provision about restitution and restitution fines, contains roughly parallel provisions to Penal Code section 1202.46 with respect to permitting a later setting of the amount, if the proper amount of restitution cannot be ascertained at the time of sentencing. (Pen. Code, § 1202.4, subd. (f).) However, Penal Code section 1203.3 specifically permits modification of probation terms, including modifying the amount of restitution ordered as a condition of probation, only "during the term of the probation." Unlike Penal Code section 1202.46, it contains no additional provision, retaining jurisdiction until the uncertain amount can be ascertained.

People v. Bernal (2002) 101 Cal.App.4th 155, upon which the People also rely, is a probation case. However, the defendant in *Bernal* had not been discharged from probation at the time of the proposed modification of the restitution order. There, the victim had settled a civil judgment against the defendant, and executed a release of any further liability. The defendant opposed the imposition of further restitution in light of

the civil release of liability. The court held that the amount ordered as restitution in a criminal case need not mirror what a victim might obtain in a civil action. The restitution condition of probation fulfilled rehabilitative and other purposes that the victim cannot waive on behalf of the prosecution by executing a civil waiver.

Neither is this a case in which the sentence is “invalid” for failure to include an order for restitution. (See *People v. Moreno* (2003) 108 Cal.App.4th 1, 3 [the sentence did not order the defendant to pay restitution to the murder victim’s family; the sentence was invalid and the court had jurisdiction to order restitution under Penal Code section 1202.46]; *People v. Rowland* (1997) 51 Cal.App.4th 1745, 1751 [the defendant was sentenced to state prison pursuant to a plea bargain; the sentence did not originally include any order for restitution, and resentencing to include a restitution order was proper because a sentence without restitution is invalid]; *People v. Harvest* (2000) 84 Cal.App.4th 641, 645 [the sentence initially included no provision for restitution, although the court reserved jurisdiction on the matter; taking up the issue and imposing a restitution order after the defendant’s criminal appeal, was proper].) Here, the orders admitting defendant to probation complied with the statutory requirement to order victim restitution as a condition of probation.

Inasmuch as defendant’s probation had expired, without revocation or extension of probation, the court had lost all jurisdiction to order him to do anything. The court lacked power to enter an order fixing the amount of restitution after defendant had been discharged. Because the court had no power to enter the order for restitution, that order

must be vacated. As a result, we need not reach defendant's contention that the amount of restitution ordered was improper or erroneously calculated.

DISPOSITION

The restitution order is reversed.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.
/s/ Hollenhorst
J.